

## **CLIENT ALERT: Massachusetts Employers Must Now Accommodate Legal Medical Marijuana Use in Most Situations - By Jeffrey S. McAllister**

On July 17, 2017, the Massachusetts Supreme Judicial Court ruled that employers must accommodate legal medical marijuana use unless the employer can show an undue hardship. This is a first-of-its kind ruling setting new precedent with respect to medical marijuana use and the workplace.

### **Background:**

The 2012 Massachusetts “Act for the Humanitarian Medical Use of Marijuana” states a “qualifying patient” shall “not be penalized under Massachusetts law in any manner or denied any right or privilege” for the use of medical marijuana. A “qualifying patient” is a “person who has been diagnosed by a licensed physician as having a debilitating medical condition.” The Act does not require an employer to accommodate “any on-site medical use of marijuana in any place of employment.”

The facts of *Barbuto v. Advantage Sales and Marketing* were fairly straightforward. Defendant Advantage Sales and Marketing (ASM) offered an entry-level sales position to plaintiff Cristina Barbuto, contingent upon her passing a drug test. Barbuto informed her supervisor that she suffers from Crohn’s disease for which she legally uses medical marijuana, but only during the evenings and never before or during work hours. After Barbuto tested positive for marijuana, ASM terminated her employment.

Barbuto then brought suit for violation of the Massachusetts anti-discrimination statute, violation of the medical marijuana law, and wrongful termination in violation of public policy. The trial court dismissed the claims and the Supreme Judicial Court took Barbuto’s appeal. The Court reversed and reinstated the discrimination claim, but upheld the dismissals for the claims of violation of the medical marijuana law and wrongful termination.

The Court first analyzed the discrimination claim brought under Chapter 151B, which makes it unlawful for an employer to dismiss or refuse to hire a “handicapped person” if the person is capable of performing the job with a reasonable accommodation. The Court determined Barbuto was a handicapped person due to her diagnosis of Crohn’s disease.

Barbuto argued that she was owed a reasonable accommodation of a waiver of ASM’s policy barring anyone from employment who tests positive for marijuana. ASM argued that no accommodation was required because the use of marijuana, for any reason, is a federal crime.

The Court rejected ASM’s argument, stating that in Massachusetts “the use and possession of medically prescribed marijuana is as lawful as the use and possession of any other prescribed medicine.” The Court held that where “medical marijuana is the most effective medication for the

employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation."

The Court reasoned that employers may be able to show they cannot accommodate medical marijuana use when it constitutes an undue hardship, and gave examples of (1) an "unacceptably significant" safety risk; (2) potential violation of the employer's statutory or contractual obligation; and (3) a federal contractor's obligations under the Drug Free Workplace Act. The Court emphasized, however, that an employer must first engage in the interactive process and determine if another reasonable accommodation is available before terminating the employee.

### **Impact:**

While this case was decided at the preliminary stage of the litigation, and was not a ruling on the ultimate merits, it effectively creates a default rule that an employer must reasonably accommodate medical marijuana use unless it can prove an undue hardship.

In most circumstances, an employer will open itself to liability if it terminates or refuses to hire an employee due to medical marijuana use, because it will be difficult to prove accommodating medical marijuana use constitutes an undue hardship. White-collar employees and employees who do not operate heavy machinery or vehicles will not pose an "unacceptably significant" safety risk.

Although not addressed by the Court, another challenge to employers in light of this new ruling is the current state of drug testing. The medical marijuana law makes clear that an employer does not have to accommodate the "on-site medical use of marijuana in any place of employment." However, because marijuana stays in the user's system for a long period of time, an employee who uses medical marijuana during the weekend when off work or at night after work may still fail a drug test taken later on. This makes it very difficult or impossible for employers to determine and prove an employee used medical marijuana at work.

We recommend immediately updating internal guidelines and employee handbooks to reflect that an employee's failed drug test due to use of medical marijuana will not result in immediate termination or a refusal to hire. Instead, if an employee or potential employee fails a drug test for medical marijuana use or discloses medical marijuana use, employers should enter into the interactive process to determine whether the employer can offer a reasonable accommodation.

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